THE "VANDA"

[C. A. (Tan Ah Tah, Buttrose and Wee Chong Jin JJ.) November 11, 1960]

[Singapore — Civil Appeal No. 9 of 1960]

Practice and Procedure — Discovery — Order for — No indorsement of memorandum upon service copy — R.S.C., O.XXX r.20 and O.XXXIX r.5 — Whether applying for further time amounts to waiver of irregularity — Point not taken in Court below — Costs.

Appeal — Contempt — When party in contempt entitled to be heard.

O. XXXIX r. 5 of the R.S.C. provides that a memorandum shall be indorsed on the service copy of every judgment or order requiring any person to do an act thereby ordered warning the party required to obey the order of the consequences of disobedience.

The defendant (appellant) Jacques Etienne Prat failed to comply with an order of Court made on December 2, 1959, directing the defendant himself, his servant or agent to make a further affidavit as to certain documents within 42 days after service of the order on his solicitors. The defendant was resident in France and his affairs in Singapore were looked after by his attorney Georges Ezaoui.

On February 2, 1960 the defendant filed an application for a further period of time within which to comply with the order made on December 2, 1959. The application was granted and the time was extended up to February 19, 1960.

On February 18, 1960, Mr. Dunbar, who had been appearing as counsel for the defendant, made what purported to be an affidavit as to documents. As the plaintiffs (respondents) were not satisfied that this was a compliance with the Order of Court made on the December 2, 1959, they filed an application under O. XXX r. 20 on February 23, 1960 asking for an order, *inter alia*, that the defence filed in the Admiralty action on behalf of the defendant be struck out, and the defendant be placed in the same position as if he had not defended, and that the action in Suit No. 1553 of 1958 be dismissed for want of prosecution. On March 2, 1960 order was made as prayed. From this order the defendant appealed.

The copy of the Order made on the December 2, 1959 which was served on the defendant's solicitors did not bear the indorsement required by O. XXXIX r. 5. One of the grounds of appeal was that the copy of the very order which was disobeyed by the defendant was not properly indorsed as required by O. XXXIX r. 5. This point was not taken in the Court below by counsel who was then appearing for the defendant.

Held: (1) because of the failure of the plaintiffs to make the indorsement required by O.XXXIX r.5 on the copy of the order dated December 2, 1959, the order made by the learned trial Judge on March 2, should not have been made and the appeal is accordingly allowed;

(2) an application for further time does not amount to waiver of irregularity contained in the order;

(3) as the defendant has succeeded on a point which was not taken in the Court below by the counsel who was then appearing for him there will be no order as to costs.

The principles laid down in *Arumugam* v. *Suppiah Chettiar*[1], followed.

Not all parties in contempt are precluded from being heard: it depends upon the circumstances of the case whether or not they are entitled to be heard. In the present case one of the grounds of appeal was that the very order which was disobeyed by the defendant was not properly indorsed as required by O. XXXIX r. 5.

Held: in the circumstances of the particular case, the defendant had a right of appeal and was entitled to be heard.

Cases referred to:—

(1) *Arumugam* v. *Suppiah Chettiar* [1935] M.L.J. 4.

(2) *Hampden* v. *Wallis* (1884) 26 Ch. D. 746 at p. 754.

COURT OF APPEAL.

K. E. Hilborne for the defendant/appellant.

J. E. Lloyd for the plaintiffs/respondents.

Cur. Adv. Vult.

Tan Ah Tah J.: The Franco-British Food Supply Co. Ltd. is a company incorporated in Singapore carrying on business as a ships' agent and supplier and in the course of its business acted as agent of the motor ships the "Vanda" and the "Volubilis" which are both registered in Marseilles, France. It will be convenient to refer to this company as the plaintiffs. The registered owner of the two motor ships is Jacques Etienne Prat who, according to the evidence, is resident in France. In this judgment he will be referred to as the defendant.

On the 29th October 1958 the plaintiffs commenced an Admiralty action *in rem* (Admiralty Suit No. 14 of 1958) against "the owners and other persons interested in the motor ship 'Vanda'" claiming the sum of $27,956.74 for necessaries supplied and monies advanced for repairs to the "Vanda" at the Port of Singapore between the months of December 1957 and October 1958 inclusive. By an amendment made pursuant to an order of Court dated the 23rd January 1959 the claim was increased to $62,280.73.

On the 4th December 1958 the defendant commenced an action (Suit No. 1553 of 1958) against the plaintiffs claiming the sum of $91,059.61 which was alleged to be the amount due by the plaintiffs as the defendant's agent for the "Volubilis" in respect of the period from November 1957 to October 1958.

The defendant does not appear to have come to Singapore in connection with this litigation. His affairs in Singapore were looked after by his attorney Georges Ezaoui.

The Admiralty action came on for hearing on the 25th May 1959. On the third day of the trial it became apparent that the two actions could not conveniently be heard separately and on the application of the defendant an order was made whereby the two actions were consolidated and the plaintiffs were given the conduct of the consolidated action. It is unnecessary to describe in detail what transpired after this order was made. It is sufficient to say that the consolidated action was heard from time to time, several adjournments having to be granted owing to the length of the trial.

The next step in the consolidated action which is relevant for the purpose of this judgment took place on the 16th November 1959. On that day, on the application of the plaintiffs, an order was made for discovery of certain documents which were considered to be material to matters in issue in the proceedings. On the 18th November

1959 Georges Ezaoui made an affidavit disclosing a number of documents.

On the 23rd November 1959, when the hearing of the consolidated action was resumed, the plaintiffs contended that the affidavit as to documents made by Georges Ezaoui on the 18th November 1959 was incomplete. The learned trial Judge directed the plaintiffs to adduce evidence to show that there had been incomplete discovery of documents. Evidence was given on behalf of both parties and, after hearing argument, the learned trial Judge on the 2nd December 1959 made an order directing the defendant by himself, his servant or agent to make a further affidavit as to certain documents within 42 days after service of the order on his solicitors. The hearing was then adjourned to a date to be fixed by the Registrar.

A copy of the order made on the 2nd December 1959 was duly served on the defendant's solicitors on the 17th December 1959, but it is common ground that it did not bear the indorsement required by Order XXXIX rule 5 of the Rules of the Supreme Court which reads as follows:—

> 5. — Every judgment or order made in any cause or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which is served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following:—
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> "If you, the within-named A.B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)."

On the 2nd February 1960 the defendant filed an application for a further period of time within which to comply with the order made on the 2nd December 1959. The application was supported by an affidavit sworn to by Georges Ezaoui which disclosed the fact that the defendant's solicitors sent a letter to the defendant on the 4th December 1959 informing him that the order of the 2nd December 1959 had been made and requesting him, *inter alia*, to send to Singapore all the documents required to be included in the further affidavit as to documents so far as the same were still in his possession. Upon the hearing of the application the learned trial Judge extended the time to the 19th February 1960 and intimated that he would not grant any further extension.

On the 18th February 1960 Mr. Dunbar, who had been appearing as counsel for the defendant, made what purported to be an affidavit as to documents. As the plaintiffs were not satisfied that this was a compliance with the order of Court made on the 2nd December 1959, they filed an application under Order XXX rule 20 on the 23rd February 1960 asking for an order, *inter alia*, that the defence filed in the Admiralty action on behalf of the defendant be struck out, and the defendant be placed in the same position as if he had not defended, and that the action in Suit No. 1553 of 1958 be dismissed for want of prosecution.

Order XXX rule 20 reads as follows:—

> 20. — (1) If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment.
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> (2) Such party shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

The application was heard by the learned trial Judge and on the 2nd March 1960 he made the following order:—

> "IT IS ORDERED that the Defence filed in Admiralty Suit No. 14 of 1958 on behalf of the said Jacques Etienne Prat be struck out and the said Jacques Etienne Prat be placed in the same position as if he had not defended and the said Franco-British Food Supply Company Limited by its Counsel undertaking not to enter Judgment for more than $45,577.78. IT IS ORDERED that the said Franco-British Food Supply Company Limited be at liberty to sign Judgment for $45,577.78 and that the action in Suit No. 1553 of 1958 be and is hereby dismissed for want of prosecution and that the costs of the consolidated action including the costs of the application be taxed and paid by the said Jacques Etienne Prat to the said Franco-British Food Supply Company Limited on the ground that the said Jacques Etienne Prat has failed to comply with the Order herein made by the Honourable Mr. Justice Chua dated the 2nd day of December, 1959, to file an affidavit of documents as therein directed. AND IT IS ORDERED that the sum of $27,000.00 by way of bail held by Drew & Napier, Solicitors for the said Franco-British Food Supply Company Limited, as stake-holders, be applied by them for and on behalf of the said Franco-British Food Supply Company Limited, in part satisfaction of the Judgment to be entered herein and that the sum of $3,500.00 paid into Court pursuant to the Order of the 30th day of March, 1959, in Suit No. 1553 of 1958 be paid out by the Accountant-General to the Solicitors for the said Franco-British Food Supply Company Limited upon Counsel for the said Franco-British Food Supply Company Limited undertaking to retain the said sums of $27,000.00 and $3,500.00 for a period of twenty-one (21) days from the date hereof and the Judge DOTH ALLOW to the applicants' Solicitors for their attendance in respect of this application, under Order LXII, rule 49(1), of the Rules of the Supreme Court, a fee of $25.00 per hour and a getting up fee of $100.00. AND IT IS ORDERED that the parties be at liberty to apply."

On the 18th March 1960, pursuant to this order, the plaintiffs entered judgment against the defendant for the sum of $45,577.78. It is from the order made on the 2nd March 1860 and the judgment entered on the 18th March 1960 that this appeal is brought.

Counsel for the plaintiffs has taken the point that as the defendant is in contempt because of his failure to comply with the order for discovery made on the 2nd December 1959 he cannot be heard on this appeal. But not all parties in contempt are precluded from being heard; it depends upon the circumstances of the case whether or not they are entitled to be heard. In the present case one of the grounds of appeal is that the copy of the very order which was disobeyed by the defendant was not properly indorsed as required by Order XXXIX rule 5. In my opinion, in the circumstances of this particular case, the defendant has a right of appeal and is entitled to be heard.

Although the defendant has relied on a number of grounds of appeal, it is in my view necessary to deal with only one of them. As I have said, the copy of the order made on the 2nd December 1959 which was served on the defendant's solicitors did not bear the indorsement required by Order XXXIX rule 5. Counsel for the defendant has submitted that in the absence of the indorsement the order dated the 2nd March 1960 should not have been made. In support of his argument he has cited the case of *Arumugam* v. *Suppiah Chettiar.*[1] That was a case in which an order was made by the trial Judge directing the defendant to make and file a further affidavit fully and sufficiently answering certain interrogatories which had been delivered to him by the plaintiff. The copy of the order which was served did not bear the indorsement required by section 560 of the Civil Procedure Code which was then in force and which is similar to Order XXXIX rule 5. As the defendant did not comply with the order, the plaintiff made an application for an order that the defence be struck out and that the defendant be placed in the same position as if he had not defended. When the application came before the trial Judge he made an order striking out the defence and giving the plaintiffs liberty to sign judgment on his statement of claim. The defendant thereupon appealed to the Court of Appeal and took the point, which had not been raised before the trial Judge, that the necessary indorsement had not been made on the copy of the order to answer interrogatories. It was held by the Court of Appeal that, because of this failure on the part of the plaintiff to comply with the provisions of section 560 of the Civil Procedure Code, the punishment for contempt of the defendant by striking out his defence could not properly be inflicted, and the appeal was accordingly allowed.

In the present case the order made on the 2nd December 1959 was an order for discovery of documents, but this makes no difference to the principle to be applied. The principle is laid down in *Arumugam* v. *Suppiah Chettiar, supra,* and, in applying it, I have come to the conclusion that because of the failure of the plaintiffs to make the indorsement required by Order XXXIX rule 5 on the copy of the order dated the 2nd December 1959, the order made by the learned trial Judge on the 2nd March 1960 should not have been made.

Counsel for the plaintiffs has submitted that the indorsement is required to be made only in those cases where the penalty subsequently sought to be imposed is attachment and not, as in the present case, the striking out of the defence. He has also suggested that the decision of the Court of Appeal in *Arumugam* v. *Suppiah Chettiar, supra,* was made *per incuriam.* As to this suggestion, it can be seen from the judgments of the three learned Judges of the Court of Appeal that the distinction sought to be drawn by counsel for the plaintiffs was considered by them. In my view there is no room for the suggestion that the decision was made *per incuriam.*

It was lastly contended by counsel for the plaintiffs that by filing the application on the 2nd February 1960 and asking for further time within which to comply with the order made on the 2nd December 1959 the defendant demonstrated that he was well aware of what was contained in the order and the consequences of failure to comply with it and therefore waived the irregularity. In putting forward this argument counsel for the plaintiffs was driven to rely on a dissenting judgment of Lindley L.J. in *Hampden* v. *Wallis*[2] at p. 754. The view which prevailed in the English Court of Appeal which heard this case is to be seen in the following passage from the judgment of Cotton L.J. at p. 753:—

> "In my opinion service of a summons for further time is not sufficient to shew that the person served has waived the right to object that the order is not indorsed in accordance with the Rules."

In view of the opinion of the majority of the Court in *Hampden* v. *Wallis, supra,* the contention that the defendant waived the irregularity by making an application for further time must fail.

For the reasons which I have stated the appeal must be allowed and the order made on the 2nd March 1960 and the judgment entered on the 18th March 1960 set aside. As the defendant has succeeded on a point which was not taken in the Court below by counsel who was then appearing for him, there will be no order as to costs. The deposit will be paid out to the defendant or his solicitors.

Buttrose and **Wee Chong Jin JJ.** concurred.

Appeal allowed.

Solicitors: *Hilborne & Co.; Drew & Napier.*

MAYOR SINGH v. LAU GEOK SWEE

[A. C. J. (Rigby J.) February 1, 1960]

[Penang — Civil Appeal No. 14 of 1959]

Practice and Procedure — Pleadings — No denial or traverse — Effect of — Whether issues of fact not pleaded can be raised on appeal.

Landlord and Tenant — Land qua land not premises — Subsequent erection of building of temporary character — Whether protected by Control of Rent Ordinance, 1956.

In this case the respondent was given possession of land as against the appellant who was his tenant. The respondent claimed that the land, when originally let, was vacant land and there had since been erected thereon a building of a temporary character which was occupied by the appellant. The appellant in his defence had not attempted to deny or traverse the correctness of those averments.

Held: (1) in the absence of any denial it must be assumed, as a matter of pleading, that the appellant admitted that the land was vacant when originally let and he admitted that the building subsequently erected thereon was a building of a temporary character;

(2) the appellant cannot raise issues of fact which were never pleaded before the trial Court.